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No. 89-757

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOANNE C. NEWAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to dismissal of the charges against her because an attorney who represented her before trial suffered from a conflict of interest, even though petitioner was represented at trial by a different attorney and petitioner suffered no prejudice from the pretrial representation by her first attorney.

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OPINIONS BELOW

The initial opinion of the Air Force Court of Military Review (Pet. App. 109-115) is reported at 15 M.J. 541. The opinion of the Court of Military Appeals reversing in part the judgment of the court of military review and remanding the case to that court (Pet. App. 117-132) is reported at 24 M.J. 238. The opinions of the court of military review on remand (Pet. App. 135-141) and on appeal after resentencing (Pet. App. 149-155) are unreported. The opinion of the Court of Military Appeals affirming the final judgment of the court of military review (Pet. App. 156-157) is not yet officially reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 8, 1989. The petition for a writ of

certiorari was filed on November 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(1) (Supp. V 1987).

STATEMENT

Following a general court-martial at Hancock Field in New York, petitioner, an officer in the United States Air Force, was convicted of using and transferring a substance that she believed to be amphetamine, in violation of Article 80 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880; possession of amphetamine, in violation of Article 92, UCMJ, 10 U.S.C. 892; possession, use, and transfer of marijuana, in violation of Article 134, UCMJ, 10 U.S.C. 934; conduct unbecoming an officer by making homosexual comments and advances toward a female enlisted member, in violation of Article 133, UCMJ, 10 U.S.C. 933; and sodomy with a second female enlisted member, in violation of Article 125, UCMJ, 10 U.S.C. 925. The court-martial sentenced petitioner to confinement for seven years, dismissal from the service, and forfeiture of all pay and allowances. The convening authority modified the findings and reduced petitioner's confinement to six years. The Court of Military Appeals set aside some of the findings of guilt and remanded the case for further proceedings. A rehearing on sentence was held on the remaining offenses, and petitioner was sentenced to 14 months' confinement, dismissal from the service, and forfeiture of all pay and allowances. On further review, the court of military review and the Court of Military Appeals both affirmed.

1. In May or June 1981, Airman Donna Ryan went to the Air Force Office of Special Investigations (OSI). Ryan was a member of the security police squadron and had previously received administrative punishment for driving

while intoxicated (DWI). Believing that she was innocent of the DWI offense, Ryan went to the OSI for assistance. Tr. 71. While at the OSI office, Ryan was asked if she would assist the OSI in an undercover capacity. Ryan decided to do so in order to prove that, despite the DWI incident, she was still "a good cop." Tr. 72.

On June 17, Ryan, along with petitioner and several other female military members, attended a softball game. While sitting in the bleachers, Ryan discussed her DWI incident with petitioner. Petitioner told Ryan that the reason she had been punished for DWI was because she was bisexual, which Ryan denied. Later, petitioner invited Ryan to go with her to a bar, and Ryan accepted. Tr. 72. Petitioner subsequently put her arm around Ryan, kissed her on the neck, and said that she loved her. Ryan pulled away from petitioner. Tr. 73.

On July 6, Ryan saw petitioner at another softball game. Along with Airman John Liles, they agreed to meet later at Ryan's dormitory room. Petitioner drove Ryan and Liles to several bars in the local area. While sitting in her car outside one bar, petitioner reached into a compartment between the seats and pulled out some speckled pills. Petitioner told Ryan and Liles that the pills were "speed" and passed them out. Tr. 73, 74. Petitioner and Liles each ingested one and a half pills; Ryan placed her pill into her pocket and later gave it to the OSI. Tr. 74. The pill was tested and found to contain caffeine. Tr. 104-105; PX 1.

On July 9, Ryan and petitioner again met at the softball field while petitioner was umpiring a game, and they later went for a ride in petitioner's car. Petitioner told Ryan that Airman Lynne Peelman had come to her house one evening after breaking up with her boyfriend. According to petitioner, while she and Peelman were in the basement petitioner kissed Peelman, Peelman responded, and they ultimately engaged in intimate physical contact. Tr. 75-76.

On July 10, petitioner invited Ryan to her house for dinner, where they were ultimately joined by Airman Liles. During a tour of her home, petitioner removed a zip-lock bag from beneath a dresser in her bedroom. Ryan estimated that the bag contained about an ounce of marijuana. Petitioner also pulled out a film canister containing the same type of pills that she had previously given Ryan and Liles. Petitioner gave Ryan and Liles two of the pills each. Liles ingested his pills, but Ryan placed hers in her pocket. Tr. 76-77. The pills were later tested and found to contain caffeine. Tr. 104-105; PX 1. Later that evening, petitioner and Peelman rolled and smoked four or five marijuana cigarettes. Ryan simulated smoking the cigarettes, as she had been taught to do by the OSI. Ryan retrieved three cigarette remnants, which were tested and found to contain marijuana. Tr. 77-78, 104-105; PX 1.

2. During the summer of 1981, petitioner and Peelman were notified that they were under investigation, and Captain John Powers, the base defense counsel, was informally assigned to them. Captain Powers saw petitioner and Peelman separately and formed an attorney-client relationship with each of them. Late in August or early in September, Captain Powers learned that he was to be transferred; he subsequently introduced his replacement, Captain Raymond Smith, to petitioner and Peelman. Captain Smith then entered into an attorney-client relationship with petitioner and Peelman. Pet. App. 119.

The investigation ultimately focused on petitioner. On about October 20, the base staff judge advocate met with Captain Smith informally to discuss the possibility of granting Peelman use immunity. The base staff judge advocate told Captain Smith that he would recommend to the convening authority that Peelman be given use immunity, and he advised Smith to encourage Peelman to cooperate. Smith and Powers discussed the matter and contacted their super-

visor, who decided that Smith should sever his attorney-client relationship with petitioner. Pet. App. 120-121. Smith withdrew as petitioner's counsel and a new attorney was assigned to petitioner on October 23, *id.* at 121, the same day that petitioner was formally charged with all of the narcotics offenses as well as the charge of conduct unbecoming an officer. Tr. 7-7.1. Peelman was formally granted use immunity a month later, on November 17. Pet. App. 120-121. Based on information provided by Peelman, petitioner was charged with sodomy on December 31, 1981. Tr. 8-8.1.

Captain Smith thereafter represented Peelman, who testified against petitioner at trial. During the course of his representation, Smith may have relied on information that he learned from petitioner in formulating his advice for Peelman. Pet. App. 121-122.

3. On appeal, petitioner argued that Captain Smith labored under a conflict of interest because before trial he represented both petitioner and Peelman, who later became a prosecution witness. The court of military review rejected petitioner's argument, on the ground that she was assigned a different attorney before any charges were filed. Pet. App. 111-113. The Court of Military Appeals, however, agreed with petitioner and held that Captain Smith's joint pretrial representation of petitioner and Peelman was improper. The court reasoned that, due to his discussions with the base staff judge advocate regarding immunity for Peelman and his subsequent representation of Peelman, "Captain Smith played an important role in producing the testimony of Airman Peelman" against petitioner at her trial. *Id.* at 128. Accordingly, the court vacated the findings of guilt "in which Peelman's testimony constituted either the only evidence of [petitioner's] guilt or such strong evidence that we are unable to conclude that [petitioner] was not prejudiced from Peelman's testimony thereon." *Id.* at 132 n.6. The court

remanded the case to the court of military review for it to determine whether the remaining findings of guilt were also tainted. *Id.* at 129.[1]

On remand, the court of military review found that the remaining findings of guilt were not tainted. The court held that the remaining convictions could stand if the government could prove "that it ' "had an independent, legitimate source for the disputed evidence." ' " Pet. App. 138 (quoting *United States* v. *Gardner*, 18 M.J. 612, 615 (A.F.C.M.R. 1984), aff'd, 22 M.J. 28 (C.M.A. 1986), quoting in turn *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 79 n.18 (1964)). After examining the record, the court determined that the government had carried its burden. Pet. App. 138-139. It found that the proof of petitioner's remaining convictions—violating a military regulation by transferring a substance that petitioner believed was amphetamine; possessing and using marijuana; and engaging in conduct unbecoming an officer by making homosexual remarks to and advances toward a female enlisted member—was based entirely on the testimony of Airman Ryan and the physical evidence that Ryan obtained. *Id.* at 138. Since that "evidence was developed and known to the Government long before either Captain Powers or Captain Smith * * * became involved in the case," *id.* at 138-139, the improper joint representation did not have any "spillover" effect on the remaining convictions, *id.* at 139. Because some of petitioner's convictions had been reversed, however, the court ordered a rehearing as to her sentence. *Id.* at 140. See *id.* at 141-148.

Following the rehearing on sentence, the court of military review, Pet. App. 149-155, and the Court of Military Appeals, *id.* at 156, both affirmed the findings and sentence.

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[1] The courts of military review have independent fact-finding authority under Article 66(c) of the UCMJ, 10 U.S.C. 866(c), which the Court of Military Appeals does not have under Article 67, 10 U.S.C. 867.

ARGUMENT

Petitioner contends that she is entitled to dismissal of the charges against her because Captain Smith improperly represented both petitioner and Peelman for a brief period during the pretrial stage of the case. Relying on *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), and *Glasser* v. *United States*, 315 U.S. 60 (1942), petitioner contends that the military appellate courts erred in undertaking to determine whether she was prejudiced by that conflict of interest. In her view, this Court's decisions hold that once a defendant has shown that her counsel suffered from a conflict of interest, the court may not inquire whether a defendant was prejudiced. Accordingly, petitioner submits, the only remedy is to dismiss the charges against her. The courts below, however, correctly rejected petitioner's claim, and the unusual facts of this case do not warrant review by this Court.

Cuyler, *Holloway*, and *Glasser* are not controlling here. In those cases, a lawyer jointly represented at trial defendants charged with identical criminal conduct whose interests conflicted. This Court held that in such cases the defendant is denied the assistance of counsel in violation of the Sixth Amendment and is entitled to a new trial at which he is represented by a lawyer who does not suffer from divided loyalties. Cf. *Chapman* v. *California*, 386 U.S. 18, 23 & n.8 (1967) (forcing a defendant to stand trial without counsel requires reversal in every case). In this case, however, Captain Smith did not represent petitioner at trial. Captain Smith withdrew as petitioner's counsel once charges were filed against her, Pet. App. 121, and he did not thereafter represent petitioner at any hearing in the case. In fact, the record shows that petitioner has been continuously represented by her current lawyer from the pretrial Article 32

hearing[2] to date. Accordingly, *Cuyler*, *Holloway*, and *Glasser* do not govern this case.

The inquiry undertaken by the military appellate court into the question whether petitioner was prejudiced is consistent with well settled authority in this Court. For instance, this Court has long held that the government's failure to provide a defendant with counsel at a pretrial stage of a criminal case can be harmless error in an appropriate case. *Rushen* v. *Spain*, 464 U.S. 114, 117-118 n.2 (1983); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977); *Coleman* v. *Alabama*, 399 U.S. 1, 10-11 (1970). See also *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *Gilbert* v. *California*, 388 U.S. 263, 272, 274 (1967); *United States* v. *Wade*, 388 U.S. 218, 242 (1967). Compare *White* v. *Maryland*, 373 U.S. 59, 60 (1963) (reversal required in a capital case where defendant's unaccepted guilty plea entered at arraignment in the absence of counsel was later introduced against him at trial); *Hamilton* v. *Alabama*, 368 U.S. 52, 54-55 (1961) (reversal required in a capital case where the defendant forfeited the right to enter an insanity plea at arraignment, where he lacked counsel). Moreover, the Court has held that the Sixth Amendment is not violated if a government informant meets with a defendant and his counsel before trial, as long as the government does not make use of privileged information in preparing and presenting its case at trial. *Weatherford* v. *Bursey*, 429 U.S. 545, 551-559 (1977). Cf. *Hoffa* v. *United States*, 385 U.S. 293, 308-309 (1966). The military appellate courts were therefore correct in ruling that not every Sixth Amendment violation requires a judgment of

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[2] Article 32 of the UCMJ, 10 U.S.C. 832, requires an impartial officer to investigate the factual basis for a charge before it may be referred to a general court-martial. An Article 32 hearing is similar to the type of preliminary hearing that is held in the civilian courts to determine whether there is probable cause to believe that the accused has committed a crime.

conviction to be set aside, much less dismissal of the charges against the accused.[3]

This Court's decision in *United States* v. *Morrison*, 449 U.S. 361 (1981), is instructive on the correct inquiry in a case like this one. In that case, after the defendant was indicted and had retained counsel, federal narcotics agents conversed with the defendant in the absence of her attorney and sought to persuade her to retain a new lawyer. The Court held that the agents' conduct, although improper, did not require a dismissal of the indictment, because the defendant was not prejudiced by the agents' conduct. The Court reasoned that "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not necessarily infringe on competing interests." 449 U.S. at 364. After canvassing its earlier Sixth Amendment decisions, the Court noted that "when before trial but after the institution of adversary proceedings, the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully ad-

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[3] It is not clear that petitioner can even assert a claim under the Sixth Amendment, since she had not been charged with a crime at the time that Captain Smith discussed the subject of use immunity for Peelman with the base staff judge advocate. See *Moran* v. *Burbine*, 475 U.S. 412, 428-431 (1986), and *United States* v. *Gouveia*, 467 U.S. 180, 187 (1984) (a defendant's Sixth Amendment right to counsel attaches "only at or after the initiation of adversary judicial proceedings against" him); *United States* v. *Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985), cert. denied, 477 U.S. 904 (1986) (in the military a defendant's right to counsel does not attach until the preferral of charges against him). Petitioner's claim is therefore more properly characterized as a due process claim, and under a due process analysis it is clear that automatic reversal is not required.

mitted and the defendant convicted." *Id.* at 365 (citing *Gilbert*, *supra*; *Wade*, *supra*; and *Massiah* v. *United States*, 377 U.S. 201 (1964)). As the Court summarized, "[o]ur approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." 449 U.S. at 365.

The military appellate courts correctly followed that approach in this case. The Court of Military Appeals found that Captain Smith's joint pretrial representation of petitioner and Peelman injured petitioner because he "played an important role in producing [Peelman's] testimony" against petitioner at trial. Pet. App. 128. Accordingly, the Court of Military Appeals vacated petitioner's convictions on all the charges that were based entirely on Peelman's testimony, or in which Peelman's testimony provided "strong evidence" of petitioner's guilt, Pet. App. 132 n.6, and the court of military review dismissed those charges on remand, *id.* at 137, 140. That action left standing only petitioner's convictions on the three charges originally filed against her before Peelman was granted use immunity. In order to determine whether petitioner was also entitled to relief on those charges, the Court of Military Appeals directed the court of military review on remand to determine whether Peelman's testimony had any "spillover" effect on those counts. In undertaking that inquiry, the court of military review required the government to prove that it had "an independent, legitimate source for the disputed evidence," *id.* at 138, which is the same burden that the government must carry under *Kastigar* v. *United States*, 406 U.S. 441, 460 (1972), to show that it has not made improper use of testimony given by a defendant under a grant of use immunity.[4] Given the nature of the Sixth Amendment

[4] Although the court of military review did not cite *Kastigar* in its opinion in this case, the court of military review clearly applied the

violation that the Court of Military Appeals found in this case, the *Kastigar* standard is an appropriate one to determine whether petitioner was denied the effective assistance of counsel or a fair trial. Cf. *Weatherford* v. *Bursey*, 429 U.S. at 550-559. In sum, the military appellate courts undertook precisely the inquiry contemplated by this Court's precedents and crafted a remedy that neutralized the adverse effect on petitioner from Captain Smith's conflict of interest.

The only remaining question is whether the government satisfied the *Kastigar* standard in this case. The court of military review twice found that the government carried its burden, since the offenses of which petitioner now stands convicted were all based upon information and physical evidence that Airman Ryan gave to the OSI in June and July 1981, well before Captain Smith became petitioner's lawyer. Pet. App. 138-139 (remand decision), 154-155 (decision on appeal following resentencing).[5] The Court of Military Appeals did not disturb those findings. Petitioner does not argue that the government's proof of the amphetamine, marijuana, and conduct-unbecoming-an-officer charges were based on Peelman's testimony. In fact, petitioner concedes that Ryan supplied the proof for those charges. Pet. 6. Under these circumstances, further review of petitioner's claims is not warranted.

Kastigar standard. The court quoted the correct standard, Pet. App. 138, it expressly drew "an analogy between the situation at bar and the Government's ability to establish that it made no improper use of an accused's immunized testimony," *id.* at 137, and it cited the decisions in *United States* v. *Lucas*, 25 M.J. 9 (C.M.A. 1987), cert. denied, 484 U.S. 1027 (1988), and *United States* v. *Gardner*, 18 M.J. at 615, which discussed *Kastigar*.

[5] The court of military review, exercising its independent fact-finding power, found that there was no spillover of tainted evidence from the dismissed allegations to those remaining. Pet. App. 139.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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